Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-964

IRANIAN SHIPPING LINES, S.A.,

Petitioner,

v.

ARYA SHIPPING LINES, S.A.,
GEORGE L. MANTA, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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January 4, 1978

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The petitioner Iranian Shipping Lines, S.A., hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this proceeding on October 6, 1977.

OPINION BELOW

The Second Circuit rendered no opinion. On October 6, 1977, more than three weeks after the oral argument, the Second Circuit entered an order affirming the judgment of the United States District Court for the Southern District of New York on the basis of the Memorandum Decision of Judge Werker of the Southern District, as reported at 426 F. Supp. 687. The Second Circuit's judgment and order, not yet reported, are reprinted in the appendix hereto, p. 1a, *infra*.

The Memorandum Decision of Judge Werker of the Southern District, dated October 19, 1976, is reported at 426 F. Supp. 687. It is reprinted in the appendix hereto, p. 3a, *infra*.

JURISDICTION

At issue is a summary judgment order, entered on October 19, 1976, by Judge Werker of the Southern District, dismissing a cross-claim filed under the federal antitrust laws by the petitioner herein, Iranian Shipping Lines, S.A. On appeal by the petitioner and following full briefing and oral argument, the Second Circuit on October 6, 1977, affirmed the judgment dismissing the antitrust cross-claim. This petition for certiorari is filed within 90 days of the Second Circuit's October 6 action.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether an Iranian corporation has "capacity . . . to sue and be sued" within the meaning of Rule 17(b), Fed. Rules Civil Proc., and thus to maintain an ongoing federal antitrust suit where (1) the corporation has been involuntarily dissolved by operation of Iranian law subsequent to the institution of the federal antitrust claim, (2) Iranian statutory law permits, without time limitation, such a dissolved corporation to sue and be sued in the process of carrying out liquidation proceedings, but (3) no liquidation proceedings have been instituted in Iran.

2. Whether, under Rule 17(b), Fed. Rules Civ. Proc., a federal court must apply the law of the forum in determining whether a former director, holding a special authorization from a foreign corporation that was subsequently dissolved by operation of foreign law, can continue to manage and maintain in a representative capacity, subsequent to the dissolution, a federal antitrust cross-claim filed on behalf of that corporation prior to said dissolution.

FEDERAL RULE INVOLVED

Rule 17(b), Federal Rules of Civil Procedure:

> (*b*) *Capacity to Sue or Be Sued.* The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held, except (1) that a partnership or other unincorporated association,

> which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States, and (2) that the capacity of a receiver appointed by a court of the United States is governed by Title 28, U.S.C. §§ 754 and 959(a).

STATEMENT OF THE CASE

The dismissal of the federal antitrust cross-claim is the culmination of a complex and prolonged litigation, the relevant portions of which may be briefly and chronologically summarized as follows:

1. Iranian Shipping Lines, S.A. (ISL), was organized in 1961 as a joint stock company under the 1932 Commercial Code of Iran.

2. One Nick C. Spanos, as all parties were aware, had long held a 48 percent stock interest in ISL. He was also a co-managing director of ISL, having been reelected to the board of directors in 1965 for a stated term of four years. On March 28, 1964, Spanos received the following special authorization (as an individual, not as a director) by means of a resolution adopted by the ISL board of directors (App. 64):

> 2. That Mr. Nick C. Spanos is appointed legal attorney of the Board of Directors, will full power and authority to negociate [sic], pursue, commit, sign any act or a action required by the Company and on behalf of the Company and sign alone. Mr. Nick C. Spanos is also authorized to institute legal action against any persoan [sic] and/or party for the collection of all funds due, and owed to the Company.

That authorization, which had no termination date, has never been revoked. Indeed, in denying an earlier motion to dismiss the antitrust claim in 1972, Judge Brieant of the Southern District specifically found (App. 148) that this resolution of the board of directors "appears to be in order and so far as any factual evidence proffered on this motion is concerned, is still in force and effect."

3. In 1967 a creditor of ISL. one Rudolph V. Alosio, brought a creditors' suit in the Southern District against ISL. *Alosio v. Iranian Shipping Lines, S.A.*, S.D.N.Y. No. 67-Civ-9. An amended complaint was filed in 1968 naming various other defendants, and other creditors were allowed to intervene as party plaintiffs. On June 10, 1968, ISL effected a general appearance in this action by filing an answer to the amended complaint; the answer has bben prepared under the supervision and authority of Spanos.

4. Out of the welter of complaints, cross-complaints, affidavits and other pretrial documents, it became clear to ISL that the various respondents herein had driven ISL into insolvency by means of a wrongful conspiracy in violation of the federal antitrust laws. For a summary of the alleged illegal acts of the respondents, see Judge Frankel's memorandum opinion in the *Alosio* case, 307 F. Supp. 1117 (S.D.N.Y. 1970).[1] These alleged illegal acts were

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[1] Judge Frankel's opinion, 307 F. Supp. at 1119, noted that the verified amended complaint in the *Alosio* proceeding, as well as the unrefuted affidavits, showed that the respondents had (1) used an inadequately financed corporate husk [ISL] to defraud those they dealt with, (2) opened illegal bank accounts to siphon money out of ISL to pay personal obligations, (3) diverted corporate revenues

then translated by ISL into a federal antitrust cross-complaint in 1972, alleging that (1) ISL had been eliminated from the competitive business of shipping goods by sea between the United States and the Persian Gulf, and (b) the respondent Arya Shipping Lines, S.A., and others associated with it had conspired to monopolize that business. Pursuant to his 1964 authorization, Spanos helped prepare this antitrust cross-complaint and signed it as one of the attorneys for ISL. At this time in 1972, ISL had no asset other than this antitrust cause of action; and there was no other director, manager, attorney or stockholder of ISL who was willing to represent ISL's interests, or who had even sought to represent or protect those interests.

5. In May of 1972, various respondents filed motions to dismiss the ISL antitrust cross-claim on the ground, *inter alia*, that the filing of the cross-claim was "not the authorized act of IRANIAN SHIPPING LINES . . . nor of any of its duly-authorized directors or stockholders" and that ISL did not have "the full standing to initiate such Cross-Claim." App. 11. After full briefing and oral argument, Judge Brieant denied these motions on September 29, 1972, finding that Spanos' authority, derived from his 1964 authorization by the ISL board of directors, was "still in force and effect." App. 147-148. In sum, he found that Spanos had full authority to file and maintain the antitrust cross-complaint on behalf of ISL.

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to themselves, and (4) driven ISL into insolvency as a means of waging personal financial warfare. The respondents have made no meaningful efforts subsequently to refute the factual charges outlined in Judge Frankel's opinion, charges which formed the basis for ISL's antitrust counter-claim.

6. The period between 1972 and 1976 was consumed with various motions not here relevant and with futile efforts to secure answers to interrogatories addressed to the respondent Arya Shipping Lines, S.A.

7. On June 22, 1976, Arya Shipping Lines filed the initial motion for summary judgment, seeking dismissal of ISL's antitrust cross-complaint. In its motion, Arya asserted that ISL "has been dissolved involuntarily under applicable Iranian law [as of April 27, 1973], the law under which cross-claimant was purportedly organized, and, consequently, that it lacks the requisite capacity to maintain this litigation." App. 253. The other respondents later joined in this Arya motion. App. 299, 301. Attached to the Arya motion was an affidavit of one Musa Sabi, a purported expert on Iranian law; and annexed to the affidavit were complete purported translations of the Iranian Commercial Code of 1932 and the revised Iranian Commercial Code of 1969. In essence, the affidavit of Musa Sabi purported to show:

> (a) ISL, as a pre-existing joint stock company, was required under the 1969 Commercial Code to transform itself into one of several specified new forms of organization. That Code also provided for a four-year grace period for such conversions, and specified that any joint stock company not so converted within that period shall be considered dissolved and "subject to the dissolution proceedings laid down in the [1932 Commercial Code]." App. 259.
>
> (b) ISL had failed to change its corporate structure by the end of the four-year grace period, April 27, 1973, and thus was "considered as having been dissolved *as of . . . April 27, 1973, and is subject to the liquidation proceed-*

ings stipulated in the [1932 Commercial Code]." App. 259; emphasis added.

(c) It should be noted that there was no claim, as there cannot be, that the 1932 Code contained any time limitation on liquidation proceedings.

8. ISL did not contest any of the foregoing statements as to the requirements of Iranian law or as to the fact that ISL had been deemed dissolved as a matter of Iranian law. But it did vigorously protest and deny the legal conclusion that Musa Sabi had drawn in his affidavit that ISL, as a "non-entity" under Iranian law, lacked the capacity to prosecute or maintain this federal antitrust action.[2] ISL affirmatively asserted that, within the meaning of Rule 17(b), Fed. Rules Civ. Proc., it had "capacity" under the 1932 Commercial Code of Iran to maintain and pursue the pending antitrust claim. App. 298. In support of that assertion, ISL pointed to the provisions of the 1932 Code that conferred legal capacity on any corporation undergoing liquidation or dissolution to have actions brought and defended in its own name, and to have its affairs wound up after its dissolution, including the collection of monies due it.[3] And reference was made to Article 203

[2] The Musa Sabi affidavit also had asserted the legal conclusion that, "as a non-entity under the laws of Iran, ISL lacks any corporate capacity whatsoever, including the capacity to prosecute this or any other litigation." App. 260-261. But no provision of Iranian law, or any official interpretation thereof, was cited in support of that conclusion.

[3] Under Article 207 of the 1932 Code, part of the liquidation function is "to wind up the affairs of the company, to discharge its obligations, to collect its debts and to distribute the assets in the manner provided for by Articles 208, 209, 210, 211 and 212." App. 279. Article 209 gives liquidators "the right to bring or defend actions in the company's name, either in person or by attorney." App. 279. See footnote 5, page 18, *infra*.

of that Code, which authorizes directors to carry out liquidation proceedings, "unless the general partners appoint other persons for this purpose chosen either from among themselves or outside the company or partnership."[4] App. 278.

9. In response to these ISL claims, the respondents secured a second affidavit from Musa Sabi. This affidavit conceded that "the status of claims that may have accrued in favor of a dissolved joint stock company, such as ISL, are governed by the liquidation proceedings set forth in the 1932 Code." App. 306. But Musa Sabi then asserted that, while ISL was "subject to" such liquidation proceedings, the proceedings can be "commenced" only by strict adherence to all the procedures set forth in the 1932 Code, including the appointment of a properly authorized liquidator. Only the liquidator of a dissolved company was said to have power to wind up its affairs or bring actions in its name. App. 306, 308. But, said Musa Sabi, since ISL had not "commenced" liquidation proceedings either by stockholder resolution or by court proceedings in Iran – as required by Iranian law – Spanos could have no authority to prosecute this antitrust litigation in the name of ISL. App. 308. That ISL had never voluntarily "commenced" liquidation proceedings under the 1932 Code is of course not contested. Suffice it to say that the Musa Sabi affidavit is silent as to the need to "commence" such voluntary proceedings when a company is involuntarily forced into dissolution by operation of law and is thereby automatically subject to the dissolution procedures.

[4] Spanos had received his 1964 authorization from the ISL board of directors not in his capacity as a director himself but as an independent authorized agent, with specific power to bring suit to collect all funds due ISL.

10. Musa Sabi's second affidavit also asserted that Spanos' term as director of ISL had expired in 1969 and that there was no provision in Iranian law for a "holding over" beyond the expiration of a term of office. He further asserted the legal conclusion that Spanos' authority to institute legal actions on behalf of ISL, pursuant to the 1964 resolution, terminated either on May 31, 1969, when his term as director expired, or on April 27, 1973, when ISL was considered dissolved as a matter of law. In short, Musa Sabi concluded that "Spanos simply has no authority *under Iranian law* to prosecute this action." App. 308; emphasis added.

11. In dismissing the antitrust cross-claim for lack of authority by Spanos to maintain the claim on behalf of ISL, Judge Werker relied almost totally upon his own personal beliefs about Spanos' authorization and upon Musa Sabi's legal conclusions drawn from his arguable analysis of Iranian law. Thus Judge Werker rejected ISL's contention as to the purpose of the 1964 resolution simply because "it is difficult to believe . . . that the 1964 board resolution was intended to authorize Spanos to act as a liquidator." 426 F. Supp. at 689. And Judge Werker said that, in light of the affidavits of Musa Sabi, "I am unwilling to conclude, as I otherwise might from the statute alone, that the express power of directors to 'carry out' liquidation proceedings under Article 203 [of the 1932 Code] also authorizes them to bring actions in the company's name." *Ibid.*

12. In sum, then, Judge Werker agreed with Musa Sabi's legal conclusions respecting "capacity" and held that (1) ISL lacked "capacity" since it had been involuntarily dissolved as of April 27, 1973, and had never initiated voluntary dissolution proceedings under the 1932 Code,

and (2) Spanos had no "capacity" since his position as an ISL director, unlike the "ususal practice" in the United States and particularly in New York, did not "carry over" beyond the expiration of his term in 1969. While referring to the second sentence of Rule 17(b), dealing with the capacity of corporations to sue and be sued, Judge Werker made no mention whatever of the third sentence of Rule 17(b), dealing with the capacity of fiduciary representatives to sue or be sued. Such was the nature of the opinion that the Second Circuit adopted.

REASONS FOR GRANTING THE WRIT

The decision below raises disturbing and important problems in the interpretation and application of Rule 17(b) of the Federal Rules of Civil Procedure. Indeed, that decision is an ominous one for all corporations, foreign or domestic, that find themselves involuntarily dissolved by operation of the laws under which they were organized. Under the Second Circuit's ruling, unless such a dissolved corporation performs the useless and often impossible act of instituting voluntary dissolution proceedings in the state of incorporation, the corporation will be barred from using the federal courts or any federal statutes to sue on legitimate federal causes of action to collect its remaining assets.

Rule 17(b) was certainly never designed to achieve such an unfair result. And that unfairness is augmented in this instance by the fact that no public policy is served by denying foreign corporations access to the federal courts where such corporations, even though defunct, are seeking to implement the antitrust laws of the United States and to collect what is their just due thereunder.

In this antitrust context, it is unthinkable that the invocation and maintenance of an antitrust claim should be dependent solely on whether corporate liquidators have been appointed under the law of Iran to conduct liquidation matters in that foreign country. In fact, it does not appear from the Iranian Commercial Code of 1932, or any other Iranian law before the courts below, that Iran has any prohibition against a defunct Iranian entity suing to collect assets in the United States despite noncompliance with local Iranian liquidation requirements. What public policy of Iran is embarrassed or defeated if ISL is allowed to continue this antitrust claim? Why should Iran be annoyed if a defunct Iranian company is permitted to collect its one major asset, its antitrust money claim, for distribution to its creditors and stockholders? Why should a federal court act so as to destroy a substantial and last remaining asset of a defunct corporation, to the detriment of creditors and stockholders, instead of taking steps to appoint a conservator or representative to hold any assets that are collected from this antitrust cross-claim? Indeed, what purpose is served by the decision below other than unwarrantedly to insulate the respondents from what may be their proper liability to ISL under the antitrust laws? And why should their allegedly ill-gotten gains be preserved, on a technicality, after the federal courts and the attorneys have spent years in preparing this case for trial?

These fundamental questions, of course, serve mainly to underscore the importance of Rule 17(b) interpretative rulings by the courts below, and the need for this Court's consideration of those determinations. It should also be emphasized that this Court has never had occasion to consider these Rule 17(b) matters; and in the absence of a definitive ruling by this Court in this case, the action of the Second Circuit in approving the reported opinion of

Judge Werker can have widespread and damaging repercussions in other federal courts called upon to deal with such Rule 17(b) problems, particularly in the antitrust context.

1. The courts below have misconceived the nature of Rule 17(b)'s reference to the "capacity of a corporation to sue or be sued."

At the heart of this case is the second sentence of Rule 17(b), which reads: "The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized." Obviously, the law of Iran is determinative in this instance of ISL's "capacity" to sue or maintain an antitrust cause of action. But what is the nature of the "capacity" that Iranian law controls?

(1) Heretofore, it has been universally assumed that the Rule 17(b) reference to "capacity" means only a "general capacity" to sue under the law of the state of organization. As was said by Judge MacMahon in the leading case on this matter, *Joseph Muller Corp. Zurich v. Societe Anonyme De Gerance*, 314 F. Supp. 439, 441 (S.D.N.Y. 1970),

> "At first glance, Rule 17 would appear to allow the state or nation under whose laws a corporation is organized to grant the corporation the capacity to sue and immunize it from being sued anywhere except in the state or nation of incorporation. 'Capacity to sue or be sued,' however, as used in the Rule was, in order to obviate this problem of creating immunity, intended to mean the general capacity to sue or be sued . . . . Once it is determined that a corporation has the general capacity 'to sue or be sued,' the Rule is satisfied."

The Second Circuit, on the appeal in the *Muller* case, expressly agreed with Judge MacMahon's conclusion "that Rule 17(b) deals only with the general capacity of a corporation to sue or be sued," 451 F.2d 727, 728 (C.A. 2, 1971), and this Court denied certiorari, 406 U.S. 906 (1972).

But in this case the Second Circuit has applied the Rule 17(b) capacity requirement as though it meant "specific capacity" rather than "general capacity." The Iranian law, by common consensus, confers on defunct corporations the "general capacity" to sue and be sued in order to wind up their affairs. That should be enough to end the Rule 17(b) matter of "capacity." The Second Circuit, however, in effect read Rule 17(b) as requiring that a defunct corporation be shown to have specific capacity to sue and be sued after compliance with dissolution proceedings actually instituted in the state of organization. In other words, the whole focus of the judicial inquiry here was whether ISL had complied with the Iranian law that deals specifically with the procedure for instituting voluntary dissolution proceedings in Iran. Therein lies a totally new and confusing element in the Rule 17(b) equation of "capacity."

(2) The Rule 17(b) concept of "capacity" has been further thrown into confusion by narrowly looking only at the Iranian law respecting the procedure for instituting *voluntary* dissolution in that jurisdiction. The Second Circuit ignored the conceded fact that ISL had been dissolved by operation of Iranian law and that it had no occasion or need to seek its own dissolution by the voluntary procedures provided by Iranian law. The very involuntariness of ISL's dissolution further emphasizes the desirability of testing its Rule 17(b) "capacity" in general rather than specific terms. The Iranian Commecial Code of 1932 obviously does not contemplate involuntary procedures, and one can fairly extract therefrom only a recognition that a corporation involuntarily thrust into dissolution and made "subject to the liquidation proceedings" of the 1932 Code (App. 259, 263) must be deemed to have the requisite "capacity" by operation of Iranian law.

(3) The Second Circuit, by approving Judge Werker's analysis, has applied the second sentence of Rule 17(b) as though it meant that a dissolved corporation that has been involuntarily given "capacity" to pursue liquidation proceedings in the incorporating state cannot be deemed to have "capacity" to pursue a corporate asset in a federal court in another jurisdiction. There is nothing in the language or the purpose of Rule 17(b) that lends support to that conclusion. The decision below in that respect can breed only confusion and inequity.

The decisions of this Court in *Oklahoma Natural Gas Co. v. Oklahoma*, 273 U.S. 257, 260 (1927), and *Chicago Title & Trust Co. v. Forty-One Thirty-Six Wilcox Bldg. Corp.*, 302 U.S. 120, 125 (1937), while not dealing with Rule 17(b), confirm the notion that a dissolved corporation can maintain a suit if it has a general statutory capacity to bring suit, even though that capacity may not have been invoked or used in the state of incorporation. The Court emphasized in both cases that, while dissolution may put an end to a corporation's existence and to its right to sue and be sued, there may be "some statutory authorization for the prolongation of its life, even for litigation purposes." 302 U.S. at 125. In the *Oklahoma* case, the Court found such a prolongation of litigation life – or the capacity to sue or be sued – in an Oklahoma statute that appeared to do just what the Iranian Commercial Code does with respect to dissolved corporation – i.e., a statute that allowed the

liquidators "to collect and pay debts" and "to maintain or defend actions in their own names by the style of the trustees of such corporation dissolved." 273 U.S. at 260. The very existence of that statute was said to indicate that the corporation "for litigating purposes is still in being and continues to be a party before this Court." *Ibid.*

There is an obvious need for this Court to render a definitive clarification of the impact of Rule 17(b) on the capacity of dissolved foreign corporation to institute and maintain suits in the federal courts to collect their remaining assets.

2. The courts below have ignored and thus misconceived the effect of the Rule 17(b) reference to the law of the forum governing the capacity of a fiduciary representative to sue or be sued.

In assessing the capacity of Spanos to continue ISL's antitrust claim, the courts below made no reference other than to the second sentence of Rule 17(b), as if the corporate capacity to sue somehow controlled Spanos' capacity to manage the suit on behalf of ISL – both before and after its involuntary dissolution. Not one reference was made to the third sentence of Rule 17(b). That sentence, when read in conjunction with the first sentence, plainly says that "The capacity of an individual . . . acting in a representative capacity, to sue or be sued . . . [i]n all other cases . . . shall be determined by the law of the state in which the district court is held . . ."

The lower courts made no effort, in other words, to assess Spanos' capacity by reference to what the third sentence of Rule 17(b) calls "the law of the state [New York] in which the district court is held." Judge Werker's opinion did cite New York Business Corporation Law § 703(b) (McKinney 1963), but immediately distinguished it as being different from what the court deemed to be the controlling law of Iran – which precisely illustrates the basic error in the court's analysis, for Rule 17(b)'s third sentence makes controlling the law of New York, not that of Iran.

Had New York law been addressed, the courts below would have had to conclude that Spanos' 1964 authorization remained fully effective, just as Judge Brieant held in 1972. Particularly is that so since the New York law provides that, upon dissolution, the legal title to all corporate property and assets and the right to pursue all remedies to collect such assets automatically vest in the last directors as trustees. See New York Business Corporation Law §703(b), cited by Judge Werker; *In re Bonnie Classics, Inc.*, 116 F. Supp. 646, 648 (S.D.N.Y. 1953); *In re Baldwin Trading Corp.*, 8 N.Y.2d 144, 147-148, 202 N.Y.S.2d 312, 313-314 (1960); *Sinnot v. Hanan*, 214 N.Y. 454, 108 N.E. 858 (1915); *Marine Trust Co. of Buffalo v. Tralles*, 263 N.Y.S. 750, 147 Misc. 426 (1933).

Since Spanos was one of the last directors and since no one else was seeking to pursue ISL's antitrust claim, New York law would have permitted and does permit Spanos to continue to manage the case. It does so by recognizing the continuing effectiveness of his 1964 authorization and by recognizing that Spanos had additional authority by virtue of his being one of the last directors of ISL' What is disturbing about the decision below is the total failure to recognize that the law of New York, the state in which the Southern District sits, is made controlling by the third sentence of Rule 17(b) as to the capacity of an individual acting in a representative capacity to sue or be sued in a fed-

eral court. On the issue of Spanos' capacity, it matters not what the Iranian Commercial Code may say or what Musa Sabi's interpretations of that Code may be.[5] It matters not whether, under Iranian law, Spanos' authorization evaporated upon the expiration of his term as director. What does matter is that a federal court has patently applied the wrong law.

Such a challenge to the plain words of the third sentence of Rule 17(b) should not go unreviewed and uncorrected. The demands of the fair administration of civil justice in the federal courts require a reminder from this Court that the law made controlling by the third sentence of Rule 17(b) shall be applied uniformly and without exception.

CONCLUSION

For these various reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner

January 4, 1978

[5] The irrelevance of Musa Sabi's interpretation of the Iranian Code respecting the power of directors to bring actions in ISL's name was exacerbated by the District Court's reliance on that interpretation in preference to its own reading of "the statute alone." 426 F. Supp. at 689. Indeed, Article 213 of that Code, which places responsibility for liquidation on the directors, flatly contradicts Musa Sabi's interpretation. Supp. App. 458.

APPENDIX

UNITED STATES COURT OF APPEALS
For the Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 6th day of October, one thousand nine hundred and seventy-seven.

Present:

HONORABLE LEONARD P. MOORE
HONORABLE WILFRED FEINBERG
HONORABLE WILLIAM H. MULLIGAN
Circuit Judges

- -x

RUDOLPH V. ALOSIO,
Plaintiff,
-against-
IRANIAN SHIPPING LINES, S.A., et al.,
Defendants.

- -x

ATLANTIC STEAMERS SUPPLY CO., INC. OF PENNSYLVANIA, ET AL.,
First Intervening Plaintiffs,
-against-
IRANIAN SHIPPING LINES, S.A., et al.,
Second Defendants.

77-7041

- -x

IRANIAN SHIPPING LINES, S.A.,
Cross-Claimant-Appellant,
-against-
PETER MORAITES, et al.,
Impleaded Defendants-Appellees.

- -x

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed on the Memorandum Decision of Judge Werker dated October 19, 1976, and reported at 426 F. Supp. 687.

/s/ Leonard P. Moore
LEONARD P. MOORE

/s/ Wilfred Feinberg
WILFRED FEINBERG

/s/ William H. Mulligan
WILLIAM H. MULLIGAN
Circuit Judges

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

– –x

RUDOLPH V. ALOSIO,

Plaintiff,

-against-

IRANIAN SHIPPING LINES, S.A., et al.,

Defendants.

– –x

ATLANTIC STEAMERS SUPPLY CO., INC. OF PENNSYLVANIA, et al.,

First Intervening Plaintiffs,

-against-

IRANIAN SHIPPING LINES, S.A., et al.,

Second Defendants.

– –x

IRANIAN SHIPPING LINES, S.A., a corporation,

Cross-Claimant,

-against-

PETER MORAITES, et al.,

Impleaded Defendants.

– –x

MEMORANDUM DECISION

72 Civ. 1392 (HFW)

HENRY F. WERKER, D.J.

This is a motion by defendant Arya Shipping Lines, S.A. pursuant to Rule 56 of the Federal Rules of Civil Procedure for summary judgment on the amended cross-claim brought against it by Iranian Shipping Lines, S.A. (hereinafter

("ISL"). The Manta defendants,[1] Robert R. Kreis and the firm of Levin, Kreis, Ruskin & Gyory have also moved for summary judgment on that cross-claim upon the papers submitted by Arya. Movants contend that ISL lacks the capacity to prosecute this suit.

The facts surrounding this motion are not complicated. On March 1, 1972, ISL filed a cross-claim against Arya and twenty-two other defendants. The cross-claim was brought by Nick C. Spanos who had been appointed as a Managing Director of ISL on May 31, 1965. ISL itself was incorporated on April 10, 1961 as a "joint stock company" under the Commercial Code of Iran of 1932 (hereinafter "1932 Code").

Amendments to the 1932 Code effective in 1969 provided that joint stock companies had to reorganize, either as "public" or "private" joint stock companies or as non-joint stock companies. Pursuant to a subsequent amendment, joint stock companies organized under the 1932 Code, such as ISL, were given until April 27, 1973 to convert to an approved form of organization. Those that did not were to be dissolved as of that date by operation of law. A certificate issued by the Registrar of Companies and Industrial Properties of the Iranian Ministry of Justice[2] states that ISL failed to make the required

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[1] The Manta defendants are: George L. Manta, Helen Manta, Mark F. Manta (a/k/a Frank Manta), Leo J. Manta and Mark F. Manta as Co-Executors of the Estate of John L. Manta, J.L. Manta, Inc., Manta Vin-Cor Steel Corporation, Manta Investments, Inc., Christ Karafotias, Paul Demos, Seymour F. Simon, Demos, Karafotias & Chrones, a partnership, and Telis Demos d/b/a Demos Travel Bureau.

[2] The Registrar is required to maintain all records which must be filed under the 1932 Code and the 1969 Amendments.

change in its corporate structure and that it "is considered as having been dissolved . . . subject to the liquidation proceedings stipulated in the [1932 Code]." The foregoing facts are not disputed.

Arya and the other movants contend that ISL lacks the capacity to continue prosecution of this suit because of the involuntary dissolution. They note that:

> "Iranian law contains no savings statute whereby the automatic incidents of corporate death are suspended for a specified period of time." Arya Memorandum at 6.

ISL maintains, however, that Spanos was authorized by an ISL Board of Directors resolution dated March 28, 1964 to "institute legal action against any person and/or party for the collection of all funds due and owed to the company." ISL urges that this resolution and the 1932 Code empower Spanos to proceed with this suit as a corporate liquidator.

DISCUSSION

Under Rule 17(b), Fed.R.Civ.P., the capacity of a corporation to sue is determined by the law under which it was organized. In deciding questions of foreign law, the court may look to the testimony of expert witnesses as well as the underlying statutes. 9 Wright & Miller, Federal Practice and Procedure § 2444 (1971). Moreover, disagreements over the meaning of a foreign statute raise questions of law, not fact, and they do not preclude the granting of a motion for summary judgment. *Bassis v. Universal Line, S.A.*, 436 F.2d 64, 68 (2d Cir. 1970); *Fleischmann Distilling Corp. v. Distillers Co., Ltd.* 395 F. Supp. 221 (S.D.N.Y. 1975).

Article 284 of the 1969 amendments to the 1932 Code provides that the dissolution of a joint stock company which has not been transformed into an approved type of organization by the deadline date "shall be subject to the dissolution proceedings laid down in the [1932 Code]." Article 203 of the 1932 Code in turn, provides that:

> "In [the] case of . . . joint stock companies, the director or directors shall carry out the liquidation proceedings . . ."

Finally, article 209 of the 1932 Code declares that:

> "Liquidators have the right to bring or defend actions in the company's name, either in person or by attorney."

The 1932 Code fails to state, however, whether the authroity of directors to carry out liquidation proceedings under article 203 makes them liquidators within the meaning of article 209.

In support of the motion for summary judgment, Arya has submitted two sworn affidavits by Musa Sabi, an accomplished Iranian attorney who has translated eight volumes of Iranian law into English. He has served for more than twenty years as an Iranian legal counsel to the United States Embassy in Tehran and is a recognized authority on the law of Iran. ISL has not questioned his credentials.

Musa Sabi states that liquidation proceedings cannot be commenced by the Board of Directors or Managing Directors acting alone. He goes on to explain that there are only two ways to commence liquidation proceedings under the 1932 Code and the ISL Articles of Association: (1) by shareholder vote at a meeting called to wind up the company in accordance with article 74 of the 1932 Code or

(2) by an order of the Iranian Court of First Instance issued upon the application of an interested party under article 143(3) of the Iranian Civil Procedure Code. Neither alternative was pursued here. Indeed, the amended ISL cross-claim notes that:

> ". . . Forty-eight percent of the shares of ISL are opposed to any dissolution or end of its corporate existence. . . . Under ISL's Articles of Association, a resolution to dissolve or liquidate ISL cannot legitimately be carried if it is opposed by as many as forty-eight percent of the shares issued and outstanding."

In light of the affidavits of Musa Sabi, I am unwilling to conclude, as I otherwise might from the statute alone, that the express power of directors to "carry out" liquidation proceedings under Article 203 also authorizes them to bring actions in the company's name.

Moreover, it is difficult to believe, as ISL contends, that the 1964 board resolution was intended to authorize Spanos to act as a liquidator. It was passed almost four years before the need to reoganize ISL arose and almost eight years before the dissolution took effect.

Even if I were to assume *arguendo* that Spanos was properly authorized in 1964 to bring suit as a director, the authorization would have expired long before the cross-claim was filed. Article 46 of the 1932 Code sets the term of office of a director at "four years at most," although a company's Articles of Association may permit the reelection of directors. Article 13 of the ISL Articles states that board members shall serve for a period of four years and that they may be reelected. Neither the 1932 Code nor the ISL Articles provides for directors to

remain in office in the event that replacement directors are not elected for some reasons. This differs of course from the usual practice in the United States. *See, e.g.*, New York Business Corporation Law § 703(b) (McKinney 1963). Since Spanos and his co-directors were last elected to their positions at an "Extraordinary Meeting" of ISL shareholders held on May 31, 1965, their terms of office expired on May 31, 1969 and Spanos was not a corporate director at the time he brought the cross-claim against Arya and others.[3] Thus, he could not possibly have brought the cross-claim as part of his duty to carry out liquidation proceedings under article 203.

The court concludes that ISL has been dissolved under Iranian law and that Spanos cannot continue its cross-claim against Arya and the other defendants. *Chicago Title & Trust Co. v. Forty-One Thirty-Six Wilcox Bldg. Corp.*, 302 U.S. 120, 124-25 (1937); *Oklahoma Natural*

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[3] At an earlier stage of this action, the Midland Bank and Trust Company moved to dismiss an ISL cross-claim against it. The bank contended that Spanos alone could not sign a stipulation of substitution of counsel because the ISL Articles of Association required documents to be signed jointly by the two Managing Directors of the company. ISL contends that in deciding that motion Judge Brieant held that "Spanos had the authority to bring the cross claim in the name and on behalf of ISL." ISL Memorandum at 3. However, that motion was addressed to a different question of law and Judge Brieant denied it "without prejudice to renew on a showing of facts indicating absence of actual authority." With respect to the board resolution upon which ISL seeks to rely, Judge Brieant observed that it was in force "so far as any factual evidence proffered on this motion is concerned." Because Arya has adduced further facts for the court's consideration at this time, I have reached a conclusion which differs from that of Judge Brieant.

Gas Co. v. Oklahoma, 273 U.S. 257-259-60. The cross-claim is therefore dismissed.

SO ORDERED.

DATED: New York, New York
October 19, 1976

/s/ Henry F. Werker
U.S.D.J.

Supreme Court, U. S.
FILED
FEB 7 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-964

IRANIAN SHIPPING LINES, S.A.,

Petitioner,

v.

ARYA SHIPPING LINES, S.A.,
GEORGE L. MANTA, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT BRIEF IN OPPOSITION

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JOINT BRIEF IN OPPOSITION

Preliminary Statement

The decisions below in this case raise no new or significant issues. The District Court dismissed the purported cross-claim of Iranian Shipping Lines ("ISL"), a defunct Iranian company, because ISL had admittedly been dissolved under the law of Iran and lacked the capacity thereunder to maintain this litigation. The Court of Appeals unanimously affirmed, on the basis of the District

Court's opinion. The decisions thus reflected no more than an application of the long-standing rule that the capacity of a corporation to sue or be sued is governed by the law under which the corporation is organized. This rule has been repeatedly stated by this Court; consistently followed throughout the Circuits; and expressly codified in the Federal Rules of Civil Procedure. Plainly, there is no "special and important" reason (see Rule 19 of this Court) for granting this Writ.

Counterstatement of Question Presented

There was, and is, only one dispositive issue in this case: Where ISL was admittedly a defunct Iranian corporation that had been dissolved under the law of Iran which provides no savings statute suspending the incidents of corporate death, did the Courts below correctly hold that ISL lacked capacity to maintain the instant action?

Counterstatement of the Case

The Statement of the Case in ISL's petition includes a melange of irrelevant and unsupported contentions. In actuality, the facts leading to the decisions below were simple and nearly all undisputed. We will set forth those facts *infra*. Because of the distorted picture presented by ISL, however, we include the following background in order to place this case in proper perspective.

(a) Background

The decision to which this petition relates was issued by District Judge Henry F. Werker in October 1976 and affirmed by the Second Circuit in October 1977. Petitioner, however, also refers to two earlier opinions by two other District Judges to whom some phase of this case had been assigned at one point. The earlier opinions have no bearing upon the instant petition.

Petitioner points first [Petitioner's Brief for certiorari ("Petitioner's Brief"), p. 5] to the 1970 opinion of Judge Frankel in the case of *Alosio* v. *Iranian Shipping Lines, S.A.*, 307 F. Supp. 1117 (S.D.N.Y. 1970), supposedly for "a summary of the alleged illegal acts of the respondents". That opinion was simply a decision on a preliminary motion to dismiss for lack of jurisdiction and cross-motion for discovery. As Judge Frankel was careful to point out therein, ". . . To be sure, the charges of fraud and conspiracy in the verified complaint and affidavits opposing the present motion may not prevail ultimately . . . ." (307 F. Supp. at 1119). ISL's allegations have been denied and contested throughout by the respondents, and there has never been the slightest finding on the merits that there is any truth in those allegations.

Petitioner also refers (Petitioner's Brief, p. 6) to a decision by Judge Brieant upon a motion made by certain respondents in May 1972 to dismiss ISL's cross-claim. What petitioner fails to say, however, is that Judge Brieant had specifically limited his decision to the factual evidence proffered upon that motion and that his denial of the motion was expressly stated to be without prejudice to renew upon a showing of further facts. Obviously, no facts could be presented to Judge Brieant upon that motion as to ISL's subsequent dissolution under Iranian law or as to the substance and effect of that law. Indeed, as Judge Werker subsequently noted in his October 1976 opinion, the motion before Judge Brieant had been "addressed to a different question of law and Judge Brieant denied it 'without prejudice to renew on a showing of facts indicating absence of actual authority.'" (426 F. Supp. at 690, n. 3; SA 687).•

The motion before Judge Werker related to ISL's status under Iranian law. ISL styled itself as "a corporation

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• References to "A" are to the Appendix filed by petitioner before the Second Circuit. References to "SA" are to the Supplemental Appendix filed by respondents before the Second Circuit.

organized and existing under the law of Iran" (A 2a, 155a) in the blunderbuss cross-claim it filed in March 1972 against some 35 parties herein. But, as respondents were eventually to learn, the Iranian Parliament had promulgated a statute in March 1969, requiring that all Iranian commercial entities such as ISL file papers of reorganization within three years or they would be dissolved (SA 407-408). The initial three-year grace period was extended for an additional year by an amendment in April 1972 (SA 408). ISL was apprised of the requirement through a communication from the Iranian Consulate (A 13a, 16a), but failed to comply with it. Accordingly, ISL was dissolved by operation of Iranian law on April 27, 1973 (SA 408).

ISL's dissolution was specifically raised in an Answer subsequently filed in response to ISL's cross-claim.* And, in June 1976, respondent Arya Shipping Lines ("Arya"), joined by other respondents, moved for summary judgment based upon the April 1973 dissolution (SA 402, 649, 651). It is the decision upon that motion and the affirmation thereof that give rise to the instant petition.

(b) The Summary Judgment Motion

The facts upon which the motion below was argued, decided and subsequently affirmed, were simple and undisputed. As set forth in the Statement of Material Facts filed by Arya, those facts were (SA 404-405):

1. Iranian Shipping Lines, S.A. ("ISL") was organized in 1961 as a "Joint Stock Company," under

* That Answer, filed by one of the Iranian cross-claim defendants, alleged as a defense (SA 401):

"Iranian Shipping Lines S.A. as of the [sic—this] date has no corporate existence as it did not adopt itself to the recent enactments passed by the Legislative Body of the Imperial Government of Iran, within the time-grace allowed by such amendments."

the Commercial Code of Iran that had become effective in 1932.

2. In 1969, the Parliament of Iran amended the 1932 Code by providing that all pre-existing Joint Stock Companies, such as ISL, were required to transform themselves into one of the two new forms of organization ("Public" or "Private" Joint Stock Companies) or into a form of organization other than a Joint Stock Company.

3. The 1969 Amendments provided a three-year grace period for the consummation of the required transformation and further provided that all Joint Stock Companies failing so to do themselves within the grace period would be dissolved.

4. In 1972, the three-year grace period was extended one year by the Iranian Parliament, so that it expired on April 27, 1973.

5. ISL never consummated the required transformation.

6. Under Iranian law, ISL is considered as having been dissolved as of April 27, 1973, and, thereunder, lacks the capacity to maintain this litigation.

ISL, in response, did not dispute any of the matters specified in paragraphs 1-5 nor the fact of dissolution set forth in the first part of paragraph 6 of the Statement.* The record thus showed without dispute that ISL was a defunct Iranian Joint Stock Company which had been dis-

* Rule 9(g) of the General Rules for the Southern District of New York requires that a party seeking summary judgment file a concise Statement of Material Facts as to which that party believes there is no genuine issue and provides that any fact so specified "will be deemed admitted unless controverted" by the opposing party. See also, Fed. R. Civ. P. 56(e), which requires that a response to a motion for summary judgment "must set forth facts showing that there is a genuine issue for trial."

solved under the law of Iran for failure to comply with mandatory registration provisions thereunder. Iranian law does not include a provision automatically suspending the incidents of corporate death, to give an entity such as ISL any continuing life. As ISL conceded in its opposing papers before the District Court, "there is no savings statute for a specified period of time" under Iranian law. (ISL's Memorandum in Opposition to Motion for Summary Judgment, p. 2, filed July 9, 1976.) "ISL", in short, was, and is, dead.

Reasons for Denying Certiorari

The decisions below reflect a clear and reasoned application of the unambiguous language of Rule 17(b) of the Federal Rules of Civil Procedure to precisely the situation for which it was intended. The decisions are entirely consistent with prior decisions of this Court, and there is no conflict among the various Circuits in their reported decisions on the same topic.

What ISL describes as an allegedly "ominous" development for all corporations "that find themselves involuntarily dissolved by operation of the laws under which they were organized" (Petitioner's Brief, p. 11), is nothing but an application of the recognized principle, codified in Rule 17(b), that the capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. The law under which ISL was organized was that of Iran, a foreign sovereign state which has an absolute right to regulate the existence, or non-existence, of its corporations. This is hardly a recurrent question of public concern, and the results achieved are of interest only to the particular litigants involved, based on uncontradicted facts peculiar to this litigation as found by the District Court and unanimously affirmed in the Court of Appeals for the Second Circuit.

I. The courts below correctly held that ISL, having been dissolved pursuant to Iranian law under which it had been organized, lacked capacity to maintain this litigation

The courts below, pursuant to Fed. R. Civ. P. 17(b), applied the law of Iran, where ISL had been organized; found that ISL had been dissolved pursuant to that law; and accordingly held that ISL lacked capacity to maintain this litigation. The decisions thus involved no more than a question of corporate capacity long settled in this Court and in many other courts as well.

It has long been our law that a corporation dissolved under the laws of its place of incorporation is without legal capacity to maintain a suit in the federal courts and that all actions pending at the time of dissolution are abated, in the absence of a statute to the contrary. This Court enunciated that principle in its seminal decision in *Oklahoma Natural Gas Co.* v. *Oklahoma*, 273 U.S. 257 (1927). There, it was held:

> It is well settled that at common law and in the federal jurisdiction a corporation which has been dissolved is as if it did not exist, and the result of the dissolution cannot be distinguished in its effect. [Citations omitted.] It follows, therefore, that as the death of the natural person abates all pending litigation to which such a person is a party, dissolution of a corporation at common law abates all litigation in which the corporation is appearing either as plaintiff or defendant (273 U.S. at 259).

Accord, *Chicago Title & Trust Co.* v. *Forty-One Thirty-Six W. Wilcox Bldg. Corp.*, 302 U.S. 120, 124-128 (1937).

This rule has been followed repeatedly by courts in dismissing pending claims of corporations which have been

dissolved.* It applies to suits based upon federal claims, as well as to state-created causes of action. *Chicago Title & Trust Co.* v. *Forty-One Thirty-Six W. Wilcox Bldg. Corp., supra* (petition for reorganization under Sec. 77B of the Federal Bankruptcy Act); *Walder* v. *Paramount Publix Corp.*, 132 F. Supp. 912, 917 (S.D.N.Y. 1955) (action under federal anti-trust statutes); *Seaboard Terminals Corp.* v. *Standard Oil Co.*, 35 F. Supp. 566, 569 (S.D.N.Y. 1940) (action under federal antitrust statutes).

The governing law in the instant case is that of Iran, where ISL had been incorporated. This is clear from Fed. R. Civ. P. 17(b), which provides: "The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized." Thus, the courts below were plainly correct in applying the law of Iran to determine ISL's capacity to sue.

ISL contends that the courts below somehow "misconceived" the meaning of Fed. R. Civ. P. 17(b). Seeking to develop a visibly strained theory of "general" capacity, ISL cites (Petitioner's Brief, pp. 13-14) to the opinion of the District Court in *Joseph Muller Corp. Zurich* v. *Societe Anonyme De Gerance et D'Armement*, 314 F. Supp. 439 (S.D.N.Y. 1970), *aff'd in part rev'd in part*, 451 F.2d 727 (2d Cir. 1971), *cert. denied*, 406 U.S. 906 (1972), as "the leading case on this matter" and claims that it supports ISL's position on this petition for Certiorari. Not so. As confirmed by the decision of the Second Circuit in *Muller*, that case, to the extent it is relevant at all, completely supports the opinions of the courts below in this case.

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* *E.g., Mather Construction Co.* v. *United States*, 475 F. 2d 1152, 1155 (Ct. Cl. 1973); *Katz* v. *Aspinwall*, 342 F. Supp. 286 (N.D. Ala. 1971), *aff'd mem.*, 459 F.2d 1045 (5th Cir.), *cert. denied*, 409 U.S. 1000 (1972); *Beasley* v. *Fox*, 173 F.2d 920 (D.C. Cir. 1949); *Woodbury Granite Co.* v. *United States*, 59 F. Supp. 150 (Ct. Cl. 1945); *Seaboard Terminals Corp.* v. *Standard Oil Co.*, 35 F. Supp. 566 (S.D.N.Y. 1940).

The principal issue in *Muller* was whether a foreign treaty precluded setting venue in this country of an action between two foreign entities. On that question the court held that Rule 17(b) concerned questions of capacity, not of venue (*i.e.*, whether, not where, a corporation can sue), and therefore the treaty provision could have no bearing on the determination of capacity under that Rule. That holding, of course, has nothing to do with this case. What is of direct relevance from *Muller*, in part an antitrust case, is its holding that the capacity of a corporation to sue at all (there, conceded by the parties) is to be determined under Rule 17(b) by the law of its place of organization, even if that place is a foreign country (451 F.2d at 728). In short, ISL is correct that *Muller* has application to this case, but, so applied, that case confirms exactly why the decisions below were correct. Once dissolved for failure to comply with Iranian law, ISL simply had no further capacity, "general" or otherwise, to maintain this litigation.

ISL further suggests (Petitioner's Brief, p. 12) that a writ of certiorari should issue because there was no specific prohibition in Iranian law that expressly prevented a defunct Iranian entity such as ISL from suing in the United States. But ISL has the issue backward. The law of Iran provided that any Joint Stock Company that, like ISL, had been dissolved had no capacity to maintain litigation of *any* sort. Iranian law contained no further specific prohibition, because none was needed. Indeed, the only possible reason for any further specific provision at all would have been to create an exception to the general proscriptive rule—precisely the exception that Iranian law does not contain.

This Court has repeatedly stated that the incidents of corporate life are extinguished upon dissolution, unless the state of corporate organization has provided an exception through a specific "savings" statute for that purpose. As this Court put it in *Oklahoma Natural Gas:*

> "[C]orporations exist for specific purposes, and only by legislative act so that if the life of the corporation

> is to continue even only for litigating purposes it is necessary that there should be some authority for the prolongation." (273 U.S. at 259.)

See also, *Chicago Title & Trust Co.* v. *Forty-One Thirty-Six W. Wilcox Bldg. Corp., supra* at 124-25. But as the District Court noted, and as ISL conceded to that court (See *supra*, pp. 5-6), Iranian law contains no savings statute. The Iranian Parliament appears instead to have announced the dissolution of non-complying Joint Stock Companies such as ISL four years in advance, thereby prolonging their existence by a specified period *prior* to dissolution. As Dr. Sabi, an Iranian attorney and a recognized authority on the law of Iran stated by affidavit to the court below (SA 657, 680):

> "[D]issolved Joint Stock Companies such as ISL have absolutely no corporate capacity under Iranian law to prosecute this or any other litigation. Whether or not such dissolution occurred prior to or subsequent to commencement of the litigation, the operative effect of ISL's dissolution under the law of Iran is the same—the capacity to maintain the litigation, if any, immediately ceased upon the dissolution of ISL as a corporate entity."•

Attempting to avoid the plain import of Iranian law, ISL purports to find the requisite capacity by arguing that ISL was "subject" to dissoluition proceedings under the 1932 Commercial Code of Iran. ISL's argument in this regard was, and is, unsupported by any proof, expert or otherwise, and is directly contrary to the expert testimony

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• Compare, *e.g., Oklahoma Natural Gas Co.* v. *Oklahoma, supra* (Oklahoma statute provided that "no action whereto any such corporation is a party shall abate by reason of such dissolution"): *Chicago T. & T. Co.* v. *Forty-One Thirty-Six W. Wilcox Building Corp., supra* at 122 (Illinois statute provided that corporations whose powers have expired "shall continue their corporate capacity for two years for the purpose only of collecting debts due such corporation. . . .").

of Dr. Sabi. Indeed, in response to the motion before the District Court, ISL submitted no proof whatsoever except an affidavit by its own attorney (SA 654) containing nothing more than his own legal argument—hardly amounting to the "significant probative evidence" required to defeat a motion for summary judgment. *First Nat'l Bank* v. *Cities Service Co.*, 391 U.S. 253, 290 (1968). See also Fed. R. Civ. P. 56(e). Certainly, this can provide no basis for the Writ sought by ISL.

Furthermore, ISL's argument in this respect is simply immaterial. No liquidation proceedings were ever commenced, and no liquidator was even appointed (SA 657-659). As the courts below found (426 F. Supp. at 689), Iranian law provides two specific and exclusive methods for appointment of a liquidator for a Joint Stock Company, one by a shareholder vote at a meeting called according to specific requirements, and the other by order of an Iranian court of first instance upon a proper application (SA 657-658). There is no dispute as to these requirements; ISL has conceded them. Nor is there any dispute that the requirements were never met (SA 658).

These prerequisites are a basic part of the laws governing corporate structure and operations in Iran. By requiring appointment of a liquidator who is to act as a fiduciary on behalf of the entire corporate interest, these requirements, similar to those in this country (See, *e.g.*, N.Y. Bus. Corp. Law §§ 1001, 1111 (McKinney 1963)), protect a dissolved entity like ISL against what otherwise could be self-interested actions of a minority faction. This could arise, for example, from the prosecution of a litigation which, although purportedly on behalf of the entity, would in fact constitute a waste of its corporate assets. As held by the courts below, these requirements of Iranian law are directly applicable to this case. This Court put it succinctly in *Oklahoma Natural Gas Co.* v. *Oklahoma:*

> "The matter [corporate capacity] is really not procedural or controlled by the rules of the court in which

> the litigation pends. It concerns the fundamental law of the corporation enacted by the state which brought the corporation into being." (273 U.S. at 260).

Here, the "fundamental law" of ISL as enacted by Iran, the sovereignty that brought ISL into being, plainly provides that ISL has no capacity.

Nor does the fact that ISL's cross-claim purported to sound under the antitrust laws change the applicability of the foregoing. For, as this Court put it in *Chicago Title & Trust Co.* v. *Forty-One Thirty-Six W. Wilcox Bldg. Corp., supra,* in holding that the dissolved corporation there lacked capacity even to commence reorganization proceedings under the Federal Bankruptcy Act:

> "[I]t hardly will be claimed that the federal government may breathe life into a corporate entity thus put to death by the statute in the lawful exercise of its sovereign authority . . . if the State attach qualifications to its sentence of extinction, nothing can be added to or taken from these qualifications by federal authority." (302 U.S. at 128).

In short, the lower courts were correct in holding that ISL lacks capacity to maintain this cross-claim and in dismissing it. Plainly, those decisions do not begin to warrant issuance of the extraordinary Writ that ISL now requests.

II. The lower courts properly held that Spanos had no capacity to maintain ISL's cross-claim

ISL argues collaterally that a writ of certiorari should issue because its cross-claim supposedly should not have been dismissed, since Spanos somehow had "capacity to manage the suit on behalf of ISL" (Petitioner's Brief

p. 16). ISL refers in this regard to the sentence of Rule 17(b) relating to individuals acting in a "representative" capacity. But, the instant claim was not commenced as a representative action. The only relevant question therefore is not whether Spanos had capacity to "manage the suit on behalf of ISL," but whether ISL had the capacity to maintain the suit at all. Spanos' alleged capacity to "manage" is simply irrelevant to ISL's capacity to litigate and to the result reached below.

Moreover, the result would be the same even if the cross-claim *arguendo* had been filed "representatively." It is black letter law that a representative can have no greater capacity than the entity he purports to represent. (*E.g.,* Restatement (Second) of Agency Sec. 120, Official Comment (a) (1958), "One cannot act on behalf of a non-existent person," W. Seavey, *Agency* Sec. 48 (1964).) This doctrine has equal application to a corporate context, whether in derivative suits or otherwise.* If this were not the law, it would lead to the untenable conclusion that a corporation could circumvent the laws of its place of origin merely by designating various collection agents to "manage" its claims.

Nor could Spanos claim to derive any capacity to "manage", let alone maintain, the cross-claim, from his status as a former director of ISL. As the District Court held and as the unrefuted record shows,** Spanos' term and

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* *E.g., Walder* v. *Paramount Publix Corp.,* 132 F. Supp. 912, 917 (S.D.N.Y. 1955); *Potter* v. *Walker,* 276 N.Y. 15, 27 (1937); *Alexander* v. *Donohoe,* 143 N.Y. 203, 211, 38 N.E. 263 (1894); *Nelson* v. *Miller,* 212 So. 2d 67 (Fla. App. 1968).

** *E.g.,* Sabi Aff. (SA 660) which stated:

> "Mr. Spanos' terms of office as a Director or Managing Director of ISL has expired. Therefore, even if liquidation proceedings had been properly commenced, which they have not, Mr. Spanos would lack the authority to prosecute this or any

(footnote continued on following page)

authority as a Director had expired no later than May 31, 1969, nearly three years before the cross-claim was filed. ISL recognizes this, and it conceded below that Spanos *"never relied on his position as a director as authority"* for managing the cross-claim. (ISL's initial brief to the Second Circuit, p. 24.)

ISL's reliance (Petitioner's Brief, pp. 4, 17) upon a board resolution passed in 1964 provides no greater support for its position. Again, the dispositive question is the capacity of ISL, not of Spanos. Further, even if it were relevant, the 1964 resolution, whatever its effect may have been at one time, expired under Iranian law, as the District Court found, when the term and authority of the ISL Board expired on May 31, 1969. Dr. Sabi put it succinctly in his affidavit filed below (SA 660):

> "Under Iranian law, the authority, if any, given to Spanos to act as agent for the Board of Directors, was terminated on May 31, 1969 (prior to institution of this action) upon the expiration of the term of office of the Board of Directors, Spanos' principal."•

Furthermore, it is obvious from the face of the 1964 Board resolution that it did not relate to dissolution proceedings eight years later (as, indeed, it could not under

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(footnote continued from preceding page)

> other litigation on behalf of ISL as a Director/Liquidator upon the purported authority of such expired offices."

Iranian law has no "holdover" doctrine which would permit tenure beyond the elected term (SA 660). Where a corporation is dissolved and no longer a going concern, American courts also do not permit "holding over." *Berl* v. *Crutcher*, 60 F.2d 440, 444 (5th Cr. 1932), *cert. denied*, 287 U.S. 670 (1933).

• Iranian law would govern this question, even if as suggested by ISL (Petitioner's Brief, p. 17) reference were made under the third sentence of Rule 17(b) to the law of New York, since that law would include conflict of laws principles. *Klebanow* v. *New York Produce Exchange*, 344 F.2d 294, 297 (2d Cir. 1965).

Iranian law; see Sabi Aff., SA 661). Even under the law of this country, "[a]uthority conferred upon a corporate officer during the lifetime of the corporation cannot be invoked as a justification for his acts after its corporate death, where the acts are not designed and calculated to wind up the affairs of the company . . ." 16A Fletcher, Cyclopedia of Private Corporations Sec. 8117 at 270 (1962). Any suggestion that ISL's cross-claim was somehow part of liquidation proceedings as to it is completely belied, as the courts below found, by Count III of the cross-claim, which sought to *enjoin* the commencement of any such liquidation proceedings. The cross-claim stated in part (Sec. 48):

> "Forty-eight percent of the shares of ISL are opposed to any dissolution or end of its corporate existence . . . . Under ISL's Articles of Association, a resolution to dissolve or liquidate ISL cannot legitimately be carried if it is opposed by as many as forty-eight percent of the shares issued and outstanding." (A 180a-180a-1)

In short, ISL's argument as to Spanos' alleged capacity to "manage" its claim is no more than a red-herring. The absence of capacity in ISL, which purported to bring the cross-claim, is dispositive. Even if Spanos' capacity were the issue, his capacity could be no greater than that of ISL, which is naught. Thus, this argument, too, fails to provide any basis for issuance of a writ of certiorari.

CONCLUSION

For the foregoing reasons, the petition for issuance of a writ of certiorari should be denied.

Dated: February 3, 1978

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Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-964

IRANIAN SHIPPING LINES, S.A.,

Petitioner,

v.

ARYA SHIPPING LINES, S.A.,
GEORGE L. MANTA, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS TO THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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The respondent's counterstatement of the Question Presented (Jt. Opp. 2) dramatically underscores the critical misconception that permeates the ruling below and makes it so ominous a precedent.

In respondents' reading of the decision, the question arising therefrom is whether Rule 17(b) withdraws capacity to sue from

> ". . . a defunct Iranian corporation that had been dissolved under the law of Iran which provides no savings statute suspending the incidents of corporate death . . ."

Respondents may well be right in so reading the decision below. But if so, the decision is indefensible, for it has totally misconceived the choice of foreign law to be followed in assessing a defunct corporation's "capacity to sue" within the meaning of Rule 17(b). To wit:

(1) The courts below, like the respondents, have equated (a) the lack of "capacity to sue" with (b) a foreign corporation's dissolution as a matter of foreign law, regardless of the consequences under foreign law of such a dissolution.

(2) The courts below, like the respondents, have totally ignored the provisions of the Iranian Commercial Code of 1932 that give a dissolved corporation the necessary "capacity to sue" in order to wind up its affairs. See, e.g., Article 202 of the Code, stating that "the liquidation of companies, after their dissolution, will take place in conformity with the following Articles," including the Article 213 provision that gives directors of dissolved corporations the responsibility for liquidating their affairs.

(3) The courts below, like the respondents, have ignored the critical fact that the ISL certificate of dissolution[1] ex-

[1] This certificate of dissolution, issued by the Iranian Ministry of Justice, was introduced into the record by the respondents. App. 643. The statement in the certificate that ISL is "subject to the liquidation proceedings stipulated in the [1932 Code]" completely contradicts respondents' present argument (Jt. Opp. 10) that the contention that ISL is "subject" to such liquidation proceedings is "unsupported by any proof, expert or otherwise, and is directly contrary to the expert testimony of Dr. Sabi." Indeed, the certificate was introduced as an exhibit to Sabi's own affidavit.

pressly states that it shall be "subject to the liquidation proceedings stipulated in the [1932 Code]," see Pet. App. 5a, thereby automatically conferring on ISL the "capacity to sue" contemplated by the procedures established in Articles 202-218 of the 1932 Code. This impact of foreign law completely satisfied the "capacity to sue" concept of Rule 17(b).

(4) The courts below, like the respondents, have sought to avoid the fact that ISL was by operation of law made "subject to the liquidation proceedings" of the Code. They do so by reference to the failure of ISL to follow the voluntary methods of dissolving a corporation, such as a stockholder vote or an order of an Iranian court. Such voluntary methods have no relevance, of course, to a dissolution by operation of law, or to the capacity of an involuntary dissolved corporation to maintain an action. Once a corporation is dissolved, whether voluntarily or by operation of law, the Code contemplates that the dissolved corporation will have capacity to sue or be sued in order to wind up its affairs. And it is immaterial to the existence of that capacity that liquidators may not have been selected in Iran to wind up affairs in that country. Rule 17(b) refers to "capacity" – not to a particular implementation of that "capacity."

(5) Finally, the courts below, like the respondents, appear to have misconceived the nature of a "savings statute suspending the incidents of corporate death." The asserted absence of any such savings statute in Iranian law, say the

respondents, deprives ISL of any "capacity to sue" following its dissolution by operation of law. See Jt. Opp. 8.

The law of Iran, however, clearly suspends the incidents of corporate death for all dissolved corporations by entitling them to follow the procedures set forth in Articles 202-218 of the 1932 Code. Such liquidation "incidents," which include the right to sue and be sued, can be considered a "savings statute" in a realistic sense. And it is significant that there is no time limit placed on this kind of capacity to sue or be sued. ISL's "capacity to sue" remains unlimited and unconditioned by any passage of time.

In support of the notion that these liquidation procedures do not constitute a savings statute, respondents point only to a supposed concession by ISL in an opposing memorandum filed in the District Court that Iranian law "contains no savings statute." Jt. Opp. 6, 10. Such a concession does not exist. The memorandum in question, which is not in the record and which in no event could serve as proof of the Iranian law on the matter, simply stated (p. 2):

> "While there is no savings statute for a specified period of time, it is clear beyond doubt that *there is under Iranian law a 'Savings Statute' which expressly permits dissolved corporations to maintain actions such as the case at bar and that ISL's dissolution was specifically subject to such savings statute.*" [Emphasis in original.]

That statement remains totally accurate,[2] and now serves as further evidence that the respondents are determined not

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[2] This statement in the ISL memorandum was made in response to a claim in the respondents' opening memorandum (p. 6) that "Iranian law contains no savings statute whereby the automatic incidents of corporate death are suspended for a specified period of time." As noted above, the liquidation provisions of Iranian law constitute a savings statute, which is not conditioned on "a specified period of time."

to acknowledge the error of the courts below in not finding the Rule 17(b) capacity in the Iranian Code provisions respecting liquidation of dissolved corporations.

CONCLUSION

The ultimate importance of this case has been recently emphasized by this Court in its decision on January 11, 1978, in *Pfizer, Inc. v. Government of India, Imperial Government of Iran, and the Republic of the Philippines*, No. 76-749. The Court there noted that to deny a foreign plaintiff injured by an antitrust violation [such as ISL] the right to sue would defeat these purposes" of the antitrust laws – to deter violators of "the fruits of their illegality" and "to compensate victims of antitrust violations for their injuries."

For these reasons, supplementing those in the petition, the writ of certiorari should issue.

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